

STATE OF MICHIGAN
COURT OF APPEALS

VALERIE DUBE and DENNIS DUBE,

Plaintiffs-Appellants,

v

ST. JOHN HOSPITAL & MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED

May 16, 2006

No. 265887

Wayne Circuit Court

LC No. 03-338048 – NH

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

In this medical malpractice action brought against defendant St. John Hospital & Medical Center, plaintiffs appeal as of right from the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(7). We affirm.

I

On March 25, 2002, Valerie Dube¹ underwent a cervical cold knife conization procedure performed by Dr. Michael F. Prysak, a licensed obstetrician and gynecologist, at St. John Hospital. During the conization procedure, a ground plate was attached to plaintiff. The ground plate was also attached to an electrocautery machine by way of a cord. The following day, plaintiff discovered that she had sustained burns on her bilateral buttocks. Plaintiff and her husband filed suit against Dr. Prysak² and defendant. They alleged that defendant, "by and through its employees" breached its duty to plaintiff by improperly placing the ground plate on her leg. Plaintiffs attached to their complaint an affidavit of merit signed by Dr. Lawrence Borow, a board-certified specialist in obstetrics and gynecology. Borow averred that, if the ground plate had been improperly placed on plaintiff at the time of surgery, there was a departure from the standard of care. However, subsequent discovery revealed that Daniella Dickens, the

¹ Because Dennis Dube's claims are derivative, the term "plaintiff" in the singular refers only to Valerie in this opinion.

² After Dr. Prysak filed an affidavit of noninvolvement, plaintiffs dismissed him from the lawsuit.

circulating nurse, was responsible for attaching the ground plate to plaintiff at the time of her surgery.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court granted the motion pursuant to MCR 2.117(C)(7), holding that the affidavit of merit signed by Dr. Borow did not comply with MCL 600.2912d(1). Dr. Borow did not practice in the same specialty as Dickens, and therefore, pursuant to MCL 600.2169, he was not qualified to testify as an expert witness against Dickens. Further, because the affidavit of merit did not comply with MCL 600.2912d, the statute of limitations was not tolled when the complaint was filed and, thus, plaintiff's claims were barred by the statute of limitations.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . statute of limitations." In reviewing a trial court's decision under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

The interpretation of a statute is a question of law, reviewed de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). Additionally, we review de novo the issue whether summary disposition was properly granted with prejudice. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997).

On appeal, plaintiff raises numerous issues that were not raised before or decided by the trial court, which we generally decline to review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). However, if the issue involves a question of law and all the facts necessary for its resolution have been presented, we may decide the issue. *Aetna Cas & Surety Co v American Community Mut Ins Co*, 199 Mich App 30, 34; 501 NW2d 174 (1992).

III

Plaintiff first claims that the trial court erred in granting summary disposition to defendant because expert testimony is not required in a medical malpractice action that relies on the doctrine of *res ipsa loquitur*. We disagree.

In a medical malpractice action, if a plaintiff is unable to prove the actual occurrence of a negligent act, the doctrine of *res ipsa loquitur* entitles the plaintiff to an inference of negligence if the following four elements are met:

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff”; and

(4) “[e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.” [*Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005), quoting *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987).]

The first element is not only the most crucial element, but it is also the element most difficult to establish. *Locke v Pachtman*, 446 Mich 216, 230-231; 521 NW2d 786 (1994). The fact of a bad medical result itself is insufficient to satisfy the first element. *Id.* at 231. Therefore, “the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury.” *Id.*

While we accept and agree that the doctrine of *res ipsa loquitur* can apply in a medical malpractice action, we do not agree with plaintiff’s assertion that, because expert testimony is not always necessary in a case based on the doctrine of *res ipsa loquitur*, an affidavit of merit was unnecessary in this case. Plaintiff argues that, because it would be within the common understanding of the jury that plaintiff would not have received the burns on her buttocks absent negligence, the case could proceed without an expert affidavit. In a medical malpractice action, however, it is clear that the plaintiff or the plaintiff’s attorney “shall file with the complaint an affidavit of merit signed by a health professional.” MCL 600.2912d(1) (emphasis added). The purpose of the affidavit of merit “is to deter frivolous medical malpractice claims.” *Young v Sellers*, 254 Mich App 447, 452; 657 NW2d 555 (2002). “The substance of the affidavit, in essence, is a qualified health professional’s opinion that the plaintiff has a valid malpractice claim.” *Scarsella v Pollak*, 461 Mich 547, 548; 607 NW2d 711 (2000) (quoting this Court’s earlier opinion). The Legislature’s use of the word “shall” in MCL 600.2912d(1) “‘indicates that an affidavit accompanying the complaint is mandatory and imperative.’” *Scarsella, supra* at 549. If the plain and ordinary meaning of a statute’s language is clear, judicial construction is neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Moreover, we note that, based on the record, this case is not one in which the doctrine of *res ipsa loquitur* applies. The record does not support a conclusion that plaintiff’s injuries would not have occurred but for negligence of defendant’s agents. Indeed, plaintiff’s own expert suggested that an equipment failure could cause the burns, and it does not appear that a jury would have a common understanding of how plaintiff sustained injury. Moreover, the record does not reveal whether the injury was a possible complication. And there has been no showing that evidence of the true explanation of plaintiff’s injury was more readily accessible to defendant than plaintiff. Plaintiff’s argument relying on *res ipsa loquitur* is misplaced.

IV

Plaintiff next argues that, even if an affidavit of merit is required in a medical malpractice action based on the doctrine of *res ipsa loquitur*, her attorney's belief that Dr. Borow was qualified to sign the affidavit of merit averring to the negligence of Dickens was reasonable. We disagree.

A

According to MCL 600.2912d(1), the necessary affidavit of merit in a medical malpractice case shall be signed "by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." MCL 600.2169 contains three requirements for an expert witness: (1) if the alleged negligent professional is a specialist, the expert witness must specialize in the same specialty on the date of the alleged malpractice, and if the alleged negligent professional is a specialist who is board certified, the expert witness must also be board certified in the same specialty, MCL 600.2169(1)(a); (2) the expert witness, in the year preceding the date of the alleged malpractice, must have devoted a majority of his or her professional time to either or both of the active clinical practice of the same health profession or specialty practiced by the alleged negligent professional or the instruction of students in the same health profession or specialty practiced by the alleged negligent professional, MCL 600.2169(1)(b); and (3) if the alleged negligent professional is a general practitioner, the expert witness must have devoted a majority of his or her professional time in the year preceding the date of the alleged malpractice to active clinical practice as a general practitioner or the instruction of students in the same health profession in which the alleged negligent professional is licensed, MCL 600.2169(1)(c). Stated summarily, the qualifications of the expert witness must "match" the qualifications of the alleged negligent health professional. *Decker v Flood*, 248 Mich App 75, 85; 638 NW2d 163 (2001).

However, because the affidavit of merit must be filed before discovery has commenced, the plaintiff's attorney must only reasonably believe that the affiant is qualified to sign the affidavit of merit. *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004). Whether an attorney's belief is reasonable depends on "the circumstances." *Geralds v Munson Healthcare*, 259 Mich App 225, 233; 673 NW2d 792 (2003); *Watts v Canady*, 253 Mich App 468, 471; 655 NW2d 784 (2002). Relevant circumstances include the information available to and the investigation conducted by the plaintiff's attorney. See *Grossman*, *supra* at 599-600; *Geralds*, *supra* at 233.

In this case, plaintiff argues that her attorney's belief, that Dr. Borow was an appropriate expert to sign the affidavit of merit, was reasonable because there is no case law delineating the appropriate health professional required to sign an affidavit of merit in a case based on the doctrine of *res ipsa loquitur*. However, absent case law addressing the specific issue phrased by plaintiff, we find that her attorney could not reasonably believe that the plain language of MCL 600.2912d would apply differently in an action relying on *res ipsa loquitur*. The language of MCL 600.2129d is clear: the plaintiff's attorney "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness" under MCL 600.2169. Thus, plaintiff's counsel must have known that an affidavit filed by the potential, necessary expert was required.

B

Plaintiff also argues that her attorney could have reasonably believed that Dr. Borow was the appropriate health professional to sign the affidavit based on a footnote in *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002). In *Cox*, the trial court instructed the jury that the defendant hospital could be held vicariously liable if it found that the “neonatal intensive care unit” was negligent. *Id.* at 10. The Supreme Court reversed, holding that the trial court’s “unit” instruction was error because it failed to specify which agents were alleged to have been negligent, and it failed to ensure that the jury understood the applicable standard of care with respect to each agent. *Id.* at 14-15. In a footnote, the Supreme Court noted that “plaintiffs did not argue at trial that the res ipsa loquitur doctrine applied.” *Cox, supra* at 14 n 14. Plaintiff contends that this reference supports her attorney’s reasonable belief that, because he was relying on res ipsa loquitur, he need not file an affidavit of merit averring to the negligence of Dickens since proof of Dickens’ individual negligence was unnecessary to prevail in this case. We disagree. The issues in *Cox* did not involve the requirements of an affidavit of merit in a case based on res ipsa loquitur.

C

Finally, plaintiff contends that her attorney’s belief that Dr. Borow was an appropriate expert to sign the affidavit of merit was reasonable because, at the time the complaint was filed, he did not have access to all plaintiff’s medical records. However, the medical records provided to plaintiff pre-suit included the intra-operative record, which contained a list of all those involved in plaintiff’s conization procedure. This list identified Dickens and her familiarity with the cautery plate used during the surgery. Accordingly, while plaintiff and her attorney may not have known who placed the ground plate on plaintiff, they had knowledge of all the persons whose actions may have contributed to the burns plaintiff received. Plaintiff’s attorney could have filed an affidavit of merit related to the nursing care and signed by a nurse who qualified to testify as an expert witness against Dickens.

We cannot conclude that plaintiff’s attorney reasonably believed that Dr. Borow was a proper affiant to aver to the negligence of anyone involved in plaintiff’s surgery, other than Dr. Prysak, including Dickens.

V

Plaintiff next claims that she was not required to file an affidavit of merit with respect to her claims based on Dickens’ conduct.

MCL 600.2912a articulates the standards of care that are applicable to general practitioners and specialists. Because both general practitioners and specialists engage in the practice of medicine and nurses do not, the Supreme Court has held that nurses are neither general practitioners nor specialists. *Cox, supra* at 19-20. Accordingly, the Supreme Court has concluded that the standards of care for general practitioners and specialists, as articulated in MCL 600.2912a, do not apply to nurses. *Id.* at 20. Plaintiff reasons that based on the ruling in *Cox*, the requirements of MCL 600.2169 also cannot be applied to nurses. We disagree. If we apply the definitions of the terms “general practitioner” and “specialist,” as provided in *Cox*,

supra, related to MCL 600.2912a, to the language of MCL 600.2169, plaintiff's argument fails as a matter of law.

MCL 600.2169 contains three criteria that must be met before a health professional may give expert testimony on the appropriate standard of care. The criteria are set forth in subsections (a), (b), and (c) of MCL 600.2169(1). Subsection (a) applies only to specialists, while subsection (c) applies only to general practitioners. However, subsection (b) is not limited to general practitioners or specialists. It applies to health professionals in general. Pursuant to MCL 600.2169(1)(b)(i), during the year immediately preceding the date of the alleged malpractice, the expert must have devoted a majority of his professional time to the active clinical practice of the same health profession as the alleged negligent professional. Alternatively, pursuant to MCL 600.2169(1)(b)(ii), an affiant can qualify as an expert witness if, during the same time frame, he or she instructed students in an accredited health professional school and in the same health profession in which the alleged negligent professional is licensed. MCL 600.2169 is not limited to physicians, but it applies to all health professionals. We are required to enforce plain and unambiguous statutory language as written. *Nastal, supra* at 720. Therefore, we reject plaintiff's argument that an expert affidavit, meeting the requirements of MCL 600.2169, was unnecessary in this medical malpractice action based on the conduct of a nurse.

Dr. Borow failed to satisfy the statutory requirements of MCL 600.2169(1)(b), with respect to Dickens' negligence. As such, the affidavit of merit filed by plaintiff with her complaint was insufficient.

VI

Plaintiff next argues that the trial court erred in dismissing her claim with prejudice because the complaint was actually accompanied by an affidavit of merit. Thus, the statute of limitations was tolled when the complaint was filed, and she is entitled to file the correct affidavit. We disagree.

MCL 600.5856(a) provides that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant" within the applicable time limit. However, because the Legislature's requirement that an affidavit of merit be filed with the complaint is "mandatory and imperative," the Supreme Court has ruled that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Scarsella, supra* at 549. In announcing this rule, the Supreme Court noted that it was only addressing "the situation in which a medical malpractice plaintiff wholly omits to file the affidavit [of merit]" *Id.* at 553. The Supreme Court further noted that this rule "does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Id.* The Supreme Court left open the issue whether a grossly nonconforming affidavit could suffice to toll the statute of limitations. *Id.* at 553 n 7. This Court subsequently determined the statute of limitations in a medical malpractice action was not tolled when the plaintiff filed an affidavit of merit signed by a health professional whom the plaintiff's

attorney could not have reasonably believed qualified to testify as an expert witness against the alleged negligent physician. *Geralds, supra* at 233, 235. This Court explained:

Semantics aside, whether the adjective used is “defective” or “grossly nonconforming” or “inadequate,” in the case at bar, plaintiff’s affidavit did not meet the standards contained in MCL 600.2912d(1) and failed to meet the express language of MCL 600.2169(1) because the affiant was a doctor with a different board certification than third-party defendant’s board certification. [*Id.* at 240.]

More recently, this Court addressed the issue in *Kirkaldy v Rim (On Remand)*, 266 Mich App 626; 702 NW2d 686 (2005). The defendants in that case were board-certified neurologists, but the plaintiff’s affidavit of merit was signed by a board-certified neurosurgeon. *Id.* at 628. This Court had previously held that the plaintiff’s attorney could not have reasonably believed that the neurosurgeon qualified as an expert witness to testify against the defendants. See *Kirkaldy v Rim*, 251 Mich App 570, 577-579; 651 NW2d 80 (2002), vacated in part 471 Mich 924 (2004). On remand, this Court held that it did not need to determine if the affidavit was merely nonconforming or was grossly nonconforming because *Geralds, supra* dictated that the defective affidavit did not toll the statute of limitations, and dismissal with prejudice was the appropriate result. *Kirkaldy (On Remand), supra* at 635-637.

We are bound by the published decisions of this Court, MCR 7.215(C)(2), and thus, because plaintiff’s affidavit of merit did not comply with MCL 600.2912d, the statute of limitations was not tolled when plaintiff filed her complaint. Therefore, the period of limitations expired, and the trial court properly dismissed the instant case with prejudice.

VII

Plaintiff next claims that she was not required to file an affidavit of merit by a nurse because Dickens is not a party to the lawsuit. This argument has previously been rejected by this Court. In *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 392-393; 668 NW2d 628 (2003), this Court held that, when a plaintiff in a medical malpractice action is suing an institutional defendant under a vicarious liability theory, the plaintiff must still file an affidavit of merit from a health professional whose credentials match those of the institutional defendant’s agent involved in the alleged malpractice. Accordingly, plaintiff was required to file an affidavit of merit signed by a nurse even though Dickens is not a party to the lawsuit. St. John Hospital, the institutional defendant, was sued on a vicarious liability theory.

VIII

Finally, plaintiff claims that the Supreme Court in *Scarsella, supra* at 549, ignored the plain language of MCL 600.5856 in holding that a medical malpractice complaint filed without an affidavit of merit does not toll the statute of limitations. We are bound by Supreme Court precedent, *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), and will not review whether our Supreme Court ignored the plain language of MCL 600.5856 when deciding *Scarsella, supra*.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Brian K. Zahra